UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

In the Matter of

BRASFIELD & GORRIE LLC

and Case 09-CA-199567

UNITED BROTHERHOOD OF CARPENTERS AND
JOINERS OF AMERICA (UBC),
INDIANA/KENTUCKY/OHIO REGIONAL
COUNCIL OF CARPENTERS

COUNSEL FOR THE GENERAL COUNSEL'S BRIEF
TO THE ADMINISTRATIVE LAW JUDGE

I. STATEMENT OF THE CASE:

This matter is before Administrative Law Judge Andrew Gollin on General Counsel's complaint, which issued on August 17, 2017, based on a charge filed by the United Brotherhood of Carpenters and Joiners of America (UBC), Indiana/Kentucky/Ohio Regional Council of Carpenters (Charging Party, or Union). The complaint alleges that Brasfield & Gorrie LLC (Respondent) violated Section 8(a)(1) of the Act by creating the impression of and engaging in surveillance at Respondent's jobsite. [1/] The administrative hearing on the complaint was held on November 8, 2017 in Cincinnati, Ohio.

[1/] At the hearing, Judge Gollin granted counsel for General Counsel's motion to amend the complaint to include an allegation of actual surveillance in addition to the allegation that Respondent had created an impression of surveillance by its same conduct. Accordingly, paragraph 5 of the Complaint was amended as follows:

> "5. (a) [previously Paragraph 5] About May 24, 2017, Respondent, by [John] Wickham, created the impression of surveillance at Respondent's jobsite by making it appear he was taking pictures or videos of employees' union activities.
>
> "5. (b) [as amended at hearing] About May 25, 2017, Respondent, by Wickham, engaged in surveillance at Respondent's job site by taking pictures or videos of employees' union activities."

II. THE FACTS:

A. Background

Respondent is general contractor for the Omni Hotel construction project (Omni project) in downtown Louisville, Kentucky, which broke ground in February 2016 and is scheduled to conclude in early 2018. (Tr. 190-191) The Omni project is a 29-story multi-use commercial hotel and residence.

As general contractor, Respondent has entered into agreements with at least 54 subcontractors to perform different functions on the jobsite. (R. Ex. 1, p. 2) One such contractor is Professional Construction Concepts (PCC), which in turn contracted with Professional Drywall Construction (PDC) to perform framing and dry wall hanging on the Omni project. [2]/ At its peak, PCC and PDC employed approximately 135 framers and hangers onsite.

While Respondent contracts much of work on the project, it is ultimately responsible for overseeing construction and setting baseline safety standards for the Omni project that applies to all subcontractors and their employees. (Tr. 189-190) Respondent requires all employees who would be performing any work on site to attend a two-part safety orientation that includes a 40-minute corporate safety video and a presentation, as well as a site specific safety presentation. (Tr. 191-192, 196-197; R. Ex. 6) Respondent further requires all employees to submit to both initial and random drug testing. (Tr. 197, 202) After employees complete Respondent's required safety orientation and drug testing, Respondent issues employees a numbered sticker

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[2]/ During the summer of 2017, the Charging Party filed a petition in Case 09-RC-199625, seeking to represent these employees and naming Respondent and both subcontractors PCC and PDC as joint employers. (R. Ex. 1) On June 23, 2017, the Regional Director issued a decision finding that PCC and PDC, but not Respondent, were joint employers of the petitioned-for unit, and further finding that an election would not effectuate the purpose of the Act because the work on-site was winding down and the employees would be laid off before any effective bargaining could occur.

Notwithstanding the Regional Director's decision finding that Respondent was not a joint employer in an unrelated representation proceeding, Respondent nonetheless necessarily exercised a degree of control over those employees, as described in the decision and further developed from evidence adduced at hearing on this complaint.

and requires that they affix the sticker to their hardhats. (Tr. 202) On an ongoing basis, all employees are required to attend weekly safety meetings on Tuesday mornings. (Tr. 215-216; R. Ex. 7, 8)

B. Wage Dispute and Work Stoppage

On May 23, 2017, [3]/ about 60 to 65 PCC/PDC employees met with David Suetholz, an attorney for the Carpenters Union, to discuss a wage issue on the Omni project. PCC/PDC employees were upset after learning they were being paid less than other workers on the job site. (Tr. 57-58, 108) At the meeting, employees resolved to bring their wage dispute to the attention of PCC/PDC management the next morning. (Tr. 58, 110)

On the morning of May 24, about 100 PDC and PCC employees arrived at the PCC/PDC office, located directly across the street from the main entrance to the construction site. (Tr. 109) Unlike typical work days, employees did not sign in at the PCC/PDC office and then cross the street to report to begin work; instead, they demanded to speak with their bosses about the wage discrepancy. (Tr. 58-60, 109) However, a PCC/PDC principal named Sergio advised employees that PCC/PDC had no authority to negotiate their wages. (Tr. 60, 110) Rather, the employees were advised that such authority rested with the Respondent. (Tr. 60-61, 110)

The employees refused to report to work on the site and remained in front of the PDC office for the balance of the work day, waiting for either the opportunity to discuss the matter with someone from the Respondent or otherwise see the wage dispute resolved. (J. Ex. 1, para. 4; Tr. 110) The employees congregated on the public sidewalks in front of the PCC offices, across the street from the Omni project entrance. (Tr. 110) A majority of PCC/PDC employees withheld labor and instead stationed themselves across the street from the project for two days before the strike ended on May 25. (J. Ex. 1; Tr. 79) By all accounts, the work stoppage was

[3]/ All dates herein are in 2017 unless otherwise noted.

peaceful. Employees returned to work after the strike without incident. No injuries were reported. (Tr. 275) No laws were broken: no one was arrested or issued a citation by the police. (Tr. 275) No discipline was issued for any picket line misconduct. (Tr. 264) Respondent presented no evidence indicating that it filed an unfair labor practice charge against the union that had supported the work stoppage.

C. Unlawful surveillance observed

Twice during the two-day work stoppage, employees Luis Estrada Trejo and Selvin Zavala observed Respondent's safety manager John Wickham taking video and/or photographs with his iPhone. [4]/ Wickham was a prominent managerial figure on the Omni project: he arranged new employees' safety orientation and drug testing, conducted the weekly "all hands" safety meetings, and, on most days, stood near the front entrance of the project to greet employees as they reported for work. [5]/ (Tr. 175, 189-192, 197-198) Consequently, Wickham was well known to employees working on the Omni project. (Tr. 111, 134) On the morning of the first day of the work stoppage, employee Trejo observed that Wickham's mood was changed, that he was "somehow upset or surprised." (Tr. 111) In addition to this change in Wickham's typically sunny disposition, Trejo also observed Wickham holding his phone at his waist and panning side to side. (Tr. 111-112) Trejo was directly across the street from Wickham at the time. (Tr. 112) Trejo saw Wickham recording him for about five seconds. (Tr. 117) At the time of the recording, Trejo was surrounded by coworkers and alerted one to what he had

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[4]/ Employee Arturo Mendoza Gil also observed an employee of Respondent recording employees during the work stoppage, but was unable to identify him. (Tr. 15) Further, attorney David Suetholz captured images of an employee of Respondent who appeared to be holding his phone in the same manner as described by Trejo and Zavala. (Tr. 66-67)

[5]/ Wickham himself testified that his purpose in doing so was not merely to greet employees with a smiling face, but also to ensure that employees were fit for duty, had proper protective gear, and were authorized to be on the job. (Tr. 35)

observed. (Tr. 112-113) Wickham admitted taking pictures of the activity but claims that it was on the second day, rather than the first. (Tr. 251, 258, 270)

Wickham was separately observed by employee Zavala recording the striking employees' protected activities from within the building using a cell phone. (Tr. 131-132) From the street below, Zavala witnessed Wickham recording the footage and pointed it out to his fellow protesters. (Tr. 132) Zavala described Wickham's motion with his camera phone in a similar fashion to how Trejo had described it: held out in front of him and moving it from side to side. Again, (Tr. 133) Wickham admitted to taking video footage but claimed it was on the second day. (Tr. 261-262, 270) He admitted that he took video footage of the protest and then called the police, purportedly because a vehicle was blocking an entrance. (Tr. 261)

The employees who testified at the hearing all stated that, before they engaged in the work stoppage on May 24 and 25, they had never observed any sort of recording by Wickham or other managers on the Omni project. (Tr. 113-114, 134, 156-157) In contrast, Wickham testified that he had often taken pictures to document safety issues. (Tr. 224) Wickham allegedly used those photos to report unsafe conditions on the jobsite and, during safety meetings, to highlight unsafe workplace practices. (Tr. 224-225)

Wickham had never before in his career witnessed a work stoppage. (Tr. 246) On May 24, when he reported to work at the entrance to "greet" employees, he observed the employees assembled in front of the PDC/PCC offices across the street. (Tr. 239) He observed a similar albeit more boisterous scene on the following day. (Tr. 244-245, 247-248) He observed some picketers cross the street to the front of the construction project and believed that some of these individuals were blocking access to the project. (Tr. 249) However, protesters moved when asked by Wickham. (Tr. 254, 258-259) Nonetheless, Wickham claims to have

taken pictures of the activity because, "I was worried, because of their actions, they were going to get someone hurt, as well [*sic*] wanted to document it." (Tr. 259) And similarly, Wickham took a short video from about the 14th floor of the building before calling 911 to report a traffic jam purportedly caused by the protest. (Tr. 262) The record discloses no reason for Wickham having taken the video. Wickham did not share the video or pictures with anyone else. (Tr. 262) He did not recommend discipline to any striking employees. (Tr. 264) He did not preserve the pictures or video for the purpose of filing a police report or for use during safety training; rather, he claimed to have deleted both the video and the pictures on the same day. (Tr. 263)

III. ARGUMENT:

In *F. W. Woolworth Co.*, 310 NLRB 1197 (1993), the Board reaffirmed the principle that photographing employees' protected activity on the mere belief that something might happen does not justify the employer's conduct when balanced against the tendency of that conduct to interfere with employees' right to engage in concerted activity. Rather, the Board requires an employer engaging in such photographing or videotaping to demonstrate that it had a reasonable basis to have anticipated misconduct by the employees. *National Steel & Shipbuilding Co.*, 324 NLRB 499 (1997), enfd. 156 F.3d 1268 (3d Cir. 1998).

A. Employees were engaged in protected concerted activity on May 24 and 25

The striking employees were engaged in protected concerted activity when they determined to withhold their labor for the purpose of protesting a wage dispute they had registered with both their immediate employer and with Respondent. The record is clear that these employees had identified an issue with respect to their terms and conditions of employment, met amongst themselves for the purpose of addressing the issue, and thereupon made a plan for the following day to raise the issue directly with PDC/PCC. When the matter

remained unresolved on May 24, the majority of PDC/PCC employees working on the Omni project refused to report to work and remained stationed outside the job site for two working days.

The employees' concerted activity was not removed from the protection of the Act simply because some in the group migrated across the street to the front of the construction site. First, it is undisputed that the majority of employees remained across the street. (Tr. 79-80, 94; Cf. Tr. 244-264), which includes extensive questioning regarding the work stoppage and purported blocking of entrances but gives no indication as to number of individuals who had "migrated" from across the street) Second, it is clear from the record that even though some employees did move to one of the entrances to the job site, those employees engaged in no misconduct that would remove them from the protection of the Act, as Respondent claims. (See Tr. 244-264) The Board has had occasion to evaluate such claims in the context of cases where striking employees have been denied reinstatement due to an employer's assertion that the employees engaged in misconduct. In *Ornamental Iron Works Co.*, 295 NLRB 473 (1989), the ALJ found in a decision adopted by the Board that specific instances of pickets blocking truck driver ingress did not constitute misconduct that would serve to deprive picketing employees of their statutory protections.

The ALJ wrote: "Specific precedent confirms that, to this end, an instantaneous blockage, which allows those seeking access to freely choose between disregarding or honoring the picket line, fails to convert protected into unprotected strike action." *Ornamental Iron Works*, 295 NLRB at 479. Indeed, the Board has long recognized a distinction with respect to such conduct, stating: "momentarily blocking cars by mass picketing, fails to disqualify a striker from reinstatement." *Id.* See also *Coronet Casuals, Inc.*, 207 NLRB 304, 305, and cases cited at fn. 9

(1973). In this regard, the Board has identified a distinction wherein misconduct is deemed serious if it "may reasonably tend to coerce or intimidate employees." *Clear Pine Mouldings, Inc.*, 268 NLRB 1044, 1046 (1984).

In this case, employees who may have been blocking entrances moved when Wickham asked them to move:

> [Wickham]: [...] I said, "I just don't want anybody getting hurt. Could you please get out of the street?" .. They did. They moved.
>
> (Tr. 246)
>
> [Respondent's counsel]: How long did they remain ... blocking the pedestrian entrance, the two pedestrian entrances and the vehicular entrance?
>
> [Wickham]: It wasn't too long. I ultimately went out and asked them if they could please move.
>
> [Counsel]: Did they?
>
> [Wickham]: They did ...
>
> (Tr. 254)

With regard to the pedestrian entrances, there is no evidence that any employee was unable to report to work on the dates in question due to the work stoppage. In fact, the record reveals that even if an employee was unable to cross at the specific entrance identified by Wickham, there were other entrances to the work site available for employees who so wished to access the site. ("There were several employees of the project that came to me and said that they could not access the project and had to go through other means." (Tr. 291) Moreover, this evidence of employee complaints is nothing more than the self-serving hearsay testimony of Wickham. (Tr. 276) There was no evidence offered by Respondent that any employee made a single threat or refused to make way for passing workers or vehicles. Quite simply, there is nothing to suggest

that the employees engaged in any type of misconduct that would render their activity unprotected.

B. Respondent reacted to employees' protected concerted activity by unlawfully creating an impression of surveillance and by actually engaging in surveillance

An employer violates Section 8(a)(1) when it engages in surveillance of employees engaged in Section 7 activity by observing them in a way that is "out of the ordinary" and thereby coercive. *Aladdin Gaming, LLC*, 345 NLRB 585, 586 (2005), citing *Sands Hotel & Casino, San Juan*, 306 NLRB 172 (1992), enfd. sub nom. mem. *S.J.R.R., Inc. v. NLRB*, 993 F.2d 913 (D.C. Cir. 1993). Indicia of coercion include the duration of the observation, the employer's distance from its employees while observing them, and whether the employer engaged in other coercive behavior during its observation. *Id.*

The Board has long held that "absent proper justification, the photographing of employees engaged in protected concerted activities violates the Act because it has a tendency to intimidate." *Holyoke Visiting Nurses Assn.*, 313 NLRB 1040, 1050 (1994). Such proscription has been extended also to include the videotaping of protected concerted activities. *F. W. Woolworth Co.*, 310 NLRB 1197 (1993). Such conduct "could reasonably tend to coerce [employees] not to take further concerted action" and "tends to create fear among employees of future reprisals." *F. W. Woolworth*, supra; *Waco, Inc.*, 273 NLRB 746, 747 (1984).

It is undisputed that Respondent, by Wickham, took pictures and video of PDC/PCC employees who were peacefully assembled outside the Omni project. There is a dispute, however, as to when those pictures and video were taken: witnesses Trejo and Zavala testified that they observed Wickham as he appeared to be taking pictures or video on May 24; Wickham testified that he did so on May 25. There is also a dispute as to whom Wickham was photographing and video-recording: Estrada and Zavala testified that they were congregated

across the street away from any entrances to the construction site at the time they witnessed Wickham recording them; Wickham, on the other hand, asserts that he only recorded employees he claims were blocking entrances.

Any credibility resolutions concerning the alleged surveillance should be resolved in favor of Trejo and Zavala, rather than Wickham. First, Wickham's failure to preserve his digital captures from his iPhone casts suspicion over his entire enterprise in recording the protesters: such files, which were uniquely in Wickham's control, would have immediately resolved any disputes, including the number of pictures actually taken, the duration of videos, the subject matter of each image, and even the digital timestamp that establishes the date and time. Wickham offered no plausible explanation for deleting the files on his iPhone so hastily. Second, the employees should be credited over Wickham because Wickham's testimony was largely self-serving.

However, given the lower threshold in cases involving photographing or video-recording protected activity, Wickham's conduct violated the Act regardless of whether the employees are credited. See, *Alle-Kiski Medical Center*, 339 NLRB 361, 365 (2003). In this regard, although the employees' concerted activity was open, Respondent's monitoring of their activity was out of the ordinary. Unlike typical mornings, on which Wickham would stand by the entrance and greet employees entering the worksite with a smile, Wickham opted instead on the days of the work stoppage to record the activity of peacefully assembled employees who were engaged in a wage dispute. Such conduct by Wickham is presumptively unlawful under Board law. *Alle-Kiski Medical Center*, supra at 364-365 (hospital security guards violated the Act by videotaping and photographing union organizers without advancing a security justification); *Fairfax*

Hospital, 310 NLRB 299, 310 (1993) (employer's photographing employees during union campaign not justified by simultaneous media picture-taking).

Aladdin Gaming, supra, on which Respondent is expected to rely, is distinguishable from this case because the employer's alleged surveillance there did not involve any photographing or video recording. In fact, in distinguishing the facts there from other cases in which the Board had found a violation, the Board specifically referenced a case in which it had found surveillance based on photographing of employees' Section 7 activity. *Aladdin Gaming*, 345 NLRB at 586, citing *Dayton Hudson Corp.*, 316 NLRB 477 (1995).

Wickham's unprecedented recording of employees' non-work activity was out of the ordinary and had a reasonable tendency to interfere with employees' protected activity. No employee witness was aware of having ever before observed Wickham or other Omni project managers taking photographs or video on the jobsite. Although Wickham testified that he had taken pictures onsite, the examples he offered differed dramatically from the scenes he claimed to have captured on about May 25. It is one thing to document bare wires in a wall or an employee jobsite injury; it is quite another to capture employees' protected activity without any clear purpose.

C. Respondent failed to proffer any legitimate justification for photographing and video recording employees

Respondent failed to offer any legitimate or reasonable justification for engaging in surveillance of employees engaged in protected activity. The Board may properly require an employer to provide a solid justification for its resort to anticipatory photographing. *NLRB v. Colonial Haven Nursing Home*, 542 F.2d 691, 701 (7th Cir. 1976). Although an employer has the right to maintain security measures necessary to the furtherance of its legitimate business objectives, an employer's subjective, honest belief that unprotected conduct may occur does not

constitute proper justification for the recording of protected activity; rather, an employer must show that it had a reasonable, objective basis for anticipating misconduct. *National Steel & Shipbuilding Co.*, 324 NLRB 499 fn. 5; *Trailmobile Trailer, LLC*, 343 NLRB 95, 96 (2004) (and cases cited therein). Moreover, it is well established that when it is once made to appear from the primary facts that an employer has engaged in conduct which operates to interfere with an employee's statutorily protected right, it is immaterial that the employer was not motivated by antiunion bias or ill intentions. *Fabric Services*, 190 NLRB 540, 543 (1971). See, also *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21 (1964); and *Time-O-Matic, Inc. v. NLRB*, 264 F.2d 96 (7th Cir. 1959).

Wickham's explanation for photographing the scene fails to establish a legitimate purpose outweighing the tendency of his conduct to interfere with protected activity. Wickham testified that he took pictures of employees blocking a pedestrian walkway because "they were going to get someone hurt," and he "wanted to document it." (Tr. 259) As noted above, an employer's subjective, honest belief that unprotected conduct may occur does not justify anticipatory photography. Even crediting Wickham that the pictures he took were limited to this one instance (a determination that would require discrediting of a more credible witness as outlined above), he failed to advance any plausible explanation how doing so served any legitimate ends. Wickham testified that the picketing employees moved when he asked them to and people were able to access the project. Wickham did not save the photos, so they could not have been used as "teaching moments" during subsequent safety meetings. Wickham did not share the photos with any other person. (Tr. 263)

Similarly, Wickham failed to preserve the video he took from inside the building. On this point, Wickham's explanation was even less clear. The record includes no indication of any

legitimate purpose, security-driven or otherwise, for taking video of the scene on the street. Wickham testified that the protest on the street below had caused a temporary traffic jam, but he failed to connect his recording of a video of the employees to any legitimate safety or security end. As with the photos, he failed to share them with anyone in a position to take any sort of corrective action. (Tr. 262) He did not show them to the police. He did not show them to PDC or PCC. He did not keep them for the purpose of providing a "teaching moment" during a safety meeting. He did not preserve them for investigation into unfair labor practices that might arguably have occurred. Any ex post facto rationalization for taking these pictures and video were vitiated by Wickham's decision to delete them.

Even assuming, arguendo, that certain conduct was unprotected, a finding of violation is still appropriate to the extent that Wickham's surveillance and the impression of surveillance necessarily captured employees who Respondent does not claim were engaged in unprotected conduct. In this regard, the Board has found Section 8(a)(1) violations under similar circumstances where an employer unlawfully solicited reports of conduct that was not coextensive with purported unprotected conduct. *J. H. Block & Co., Inc.*, 247 NLRB 262 (1980) (even if an employer receives reports of misconduct which do not constitute protected activity under the Act, that fact would not immunize solicitation of reports which are not strictly limited to unlawful or otherwise unprotected conduct). By the same reasoning, any protected activity captured by Wickham runs afoul of Section 8(a)(1). While the General Counsel maintains that Respondent failed to present evidence that any single employee engaged in conduct so as to remove him from the protection of the Act, it is nonetheless clear that witnesses Trejo and Zavala were stationed across the street from the construction site at the time that they witnessed Wickham pointing his camera at them. Since Wickham's (unjustified) preoccupation with the

protesters appears to have been focused on activity occurring at or near the pedestrian entrances, Respondent has failed in any event to submit a legitimate justification for recording other activity.

D. Respondent is liable for violating Section 8(a)(1) by engaging in surveillance and creating the impression of surveillance, even though it was not the direct employer of the aggrieved employees

Employees are protected from infringements on the exercise of rights guaranteed in Section 7, and such protections extend beyond the immediate employer-employee relationship. *Fabric Services*, 190 NLRB 540, 541-542 (1971). See, also *Jimmy Kilgore Trucking Company*, 254 NLRB 935 (1981)(Respondent employer violated Section 8(a)(1) of the Act by being instrumental in or causing the termination of an employee of a non-Respondent employer); *Lucky Stores, Inc.*, 243 NLRB 642, 643 (1979); *A.M. Steigerwald Co.*, 236 NLRB 1512, 1515 (1978) (Respondent credit union violated Section 8(a)(1) of the Act by maintaining discriminatory rule against organized employees and threatening employees of a separate respondent employer).

In *Fabric Services*, supra, an employee of a contractor telephone company was dispatched to perform work at Fabric Services. He wore a union pocket protector and was advised by a manager at *Fabric Services* that he would not be permitted to return to work whilst wearing the union apparel. In finding a violation, the ALJ rendered a decision that was adopted by the Board and that addressed the question of the employer-employee relationship as follows:

> I find no basis, either in the declared policy of the Act or in any delineating provision of it for construing Section 8(a)(1) as safeguarding employees in the exercise of the Section 7 rights only from infringements at the hands of their own employer. To the contrary, the specific language of the Act clearly manifests a legislative purpose to extend the statutory protection of Section 8(a)(1) beyond the immediate employer-employee relationship. Thus Section 8(a)(1) makes it "an unfair labor practice for an employer-to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in Section 7." And Section 2(3)

> declares, "The term employee shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise. ..." Moreover, Section 2(9), which defines "labor dispute" as including "any controversy. ... regardless of whether the disputants stand in the proximate relationship of employer and employee" further discloses a statutory aim to give the Act's various prohibitions a broad rather than narrow reading, except, of course, where the prohibition is limited in its internal context or is specifically restricted by other express language of the Act. See *Phelps Dodge Corp. v. NLRB.*, 313 U.S. 177, 192.

Fabric Services, 190 NLRB at 541-542. See, also *Nova Southeastern University*, 357 NLRB 760 (2011) (Respondent University violated Section 8(a)(1) of the Act by prohibiting employees of its maintenance contractor from handbilling on its property).

Here, it is undisputed that Respondent is an employer within the jurisdiction of the Act. Moreover, employees would have reasonably construed Respondent as having some degree of control over their terms and conditions of employment. Employee Gil testified as to his belief that Respondent and PCC were the same company. (Tr. 155) Such belief is warranted given the objective facts adduced at the hearing: Respondent had its own procedures for onboarding employees at the Omni project. All employees had to go through Respondent's safety orientation and submit to Respondent's drug testing procedures. Thereafter, Respondent was responsible for enforcing safety procedures and policies to all individuals who worked on the job site. (Tr. 268) Wickham personally observed employees entering the jobsite with the purpose of verifying that they were fit for duty. Furthermore, PDC/PCC employees had good reason to believe that Respondent's authority over their employment extended beyond safety matters: after they were rebuffed by their own employer, they were directed to address their wage dispute with Respondent. (Tr. 110) Evidence in the record suggests that some employees may even have met directly with agents of Respondent. (Tr. 88)

Under these circumstances, Respondent's recording of protected activity, under the ex post facto rationalization that safety concerns were implicated, clearly establishes a violation of the Act. Respondent cannot shield itself from liability by relying on the Region's decision and order in Case 09-RC-199625 finding that it was not a joint employer within the context of a representation petition later filed. There is ample evidence upon which one may conclude that Respondent's conduct had a reasonable tendency to restrain or interfere with the employees' protected concerted activity.

IV. CONCLUSION:

Based on the foregoing, and the record as a whole, the General Counsel submits that Respondent engaged in actual surveillance and created the impression that employees of PDC and PCC were under surveillance when employees observed Wickham taking photographs and video of their protected activity on about May 24 and 25. Accordingly, it is respectfully requested that the Administrative Law Judge find that Respondent violated Section 8(a)(1) of the Act by Wickham's conduct.

V. REMEDY:

The General Counsel seeks an order requiring that Respondent cease and desist from engaging in surveillance and creating the impression of surveillance and to post the attached proposed notice in conspicuous places in and around its Omni project jobsite so advising employees. Respondent should also be required to mail copies of the notice to all PDC/PCC employees who were employed at its Omni project site during the dates of the alleged violations. The notice mailing is necessary to ensure that all affected employees are properly notified of the order and that the violation is fully remedied. Evidence at hearing established that the number of PDC/PCC employees employed at the Omni project site has declined from a peak of about 136

to about 50 or 60. (Tr. 245, 277) The project is winding down and is anticipated to be completed in March 2018. (Tr. 277) It is anticipated that most framers and drywall hangers will have completed any remaining work well before that completion date. The General Counsel seeks all other relief as may be just and proper to remedy the unfair labor practices alleged.

Attached hereto as Attachment A is a proposed Notice to Employees for your consideration.

Dated at Cincinnati, Ohio this 1st day of December 2017.

Respectfully submitted,

Joseph F. Tansino
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Region 9, National Labor Relations Board
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Attachment

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT make it appear to you that we are watching or taking pictures or videos of your union activities.

WE WILL NOT watch you in order to find out about your union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights under Section 7 of the Act.

BRASFIELD & GORRIE LLC
(Employer)

Dated: _____ **By:** _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below or you may call the Board's toll-free number 1-866-667-NLRB (1-866-667-6572). Hearing impaired persons may contact the Agency's TTY service at 1-866-315-NLRB. You may also obtain information from the Board's website: www.nlrb.gov.

Telephone:
Hours of Operation:

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the above Regional Office's Compliance Officer.

CERTIFICATE OF SERVICE

December 1, 2017

I hereby certify that I served, by electronic mail, the attached Counsel for the General Counsel's Brief to the Administrative Law Judge, upon the following persons, addressed to them at the following email addresses:

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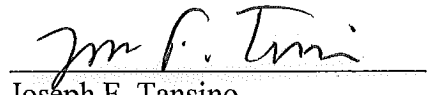

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